Supreme Court, U. S.
FILED
OCT 15 1980
MICHAEL RODAK, JR., CLERK

No. 80-394

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY EARL SHRIVER,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

PETITIONER'S REPLY BRIEF

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Phone (405) 233-4321
Counsel of Record for Petitioner

October, 1980

TABLE OF AUTHORITIES

Cases	PAGE
Franks v. Delaware, 438 U.S. 154 (1978)	2
Jackson v. Denno, 378 U.S. 368 (1964)	2
Locklin v. Switzer Brothers, Inc., 348 F.2d 244 (9th Cir. 1965) on remand 261 F.Supp. 582	6
London v. East Feliciana Parish Police Jury, 347 F. Supp. 132 (D.C. La. 1972), rev'd on other grounds 476 F.2d 637	6
United States v. Certain Land in Borough of Manhattan, 357 F.Supp. 1382 (D.C. N.Y. 1972)	6
United States v. Dibble, 429 F.2d 598 (9th Cir. 1970)	6
United States v. Peters, 625 F.2d 366 (10th Cir. 1980)	4
United States v. Smith, 495 F.2d 668 (10th Cir. 1974)	4
Miscellaneous	
1 Starkie, Evidence, 96, 129 (1824)	3
5 Wigmore, Evidence (Chadburn Rev.), §1367, p. 32	3-4
5 Wigmore, Evidence (Chadburn Rev.), §1384, p. 85	6

APPENDIX

APPENDIX A — Defendant's Response to Motion to Censure and Motion to Strike, filed in the Dist. Court of Oklahoma County, April 5, 1978	A-1
APPENDIX B — Memo dated February 5, 1978	B-1
APPENDIX C — Affidavit of Deirdre Dexter, filed in Oklahoma County District Court, April 5, 1978	C-1

No. 80-394

In the Supreme Court of the United States

OCTOBER TERM, 1980

HENRY EARL SHRIVER,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF OKLAHOMA

PETITIONER'S REPLY BRIEF

The Respondent's argument[1] that a meeting of trial counsel with the Judge in his chambers during a recess where each side presented their respective offers of proof on the question of whether the challenged evidence was being offered in violation of plea agreement negotiations was "for all intents and purposes" (Response Brief, p. 6) an evdentiary hearing (the claimed absence of which is the

[1] Other arguments made by the Respondent, *i.e.*, that the objected evidence was not prejudicial to the Petitioner are not discussed here in obedience to Rule 22, because they are discussed in the Petition for Certiorari at pages 16 through 19. Respondent has not challenged the argument or authorities set forth at pages 6 through 10 and 12 through 15 of the Petition for Certiorari.

crux of this petition for certiorari) is without legal or intellectual authority or persuasiveness for the following reasons:

One, the Respondent confuses the appropriateness of an initial judicial inquiry with the necessity for an evidentiary hearing. Not all objections require a hearing to resolve. The court must first make a preliminary inquiry to determine whether there are sufficient facts proffered so that, if the facts are proven, the movant is entitled to the legal relief requested. If such threshold burden is met, a hearing is necessary, whether the challenged evidence is an admission against interest (*Jackson* v. *Denno,* 378 U.S. 368 (1964)), evidence seized pursuant to an illegal search (*Franks* v. *Delaware,* 438 U.S. 154 (1978)), or evidence obtained in violation of a rule prohibiting the use at trial of evidence disclosed during plea negotiations. We say that due process requires such an evidentiary hearing when the offer of proof by the Petitioner would, if proven, require the trial court to sustain his objections.

Two, the Petitioner met his burden to establish the necessity for an evidentiary hearing in this case. The offer of proof was specific enough that, if accepted by the trier of fact, the evidence challenged would have to have been excluded. Likewise, if the statement of Mr. Coats, the prosecutor (which we categorize as an offer of proof although he did not identify it as such), was accepted, the evidence challenged would have been admissible. The Respondent claims that:

> "Moreover, the situation herein is somewhat unique in that three of the most crucial witnesses who would have testified in an 'evidentiary' hearing, i.e., District

> Attorney Andrew Coats, Assistant District Attorney Jim Laurence, and defense counsel Stephen Jones, were all present at the *in camera* hearing. All basically told their versions of what happened and how the $1,500.00 loan came to light. As officers of the Court, there is no reason to believe that they would have told the Court anything different if they had formally 'testified.'" (Responent's Brief, p. 6)

Such an allegation is a non-sequiter. If judges were allowed to resolve contested issues of fact when the evidence is conflicting on the oral statement of opposing advocates, the jury system would be abolished overnight.

Three, even if each attorney repeated the same statement under oath had a hearing been held, that does not foreclose the necessity for an evidentiary hearing, for two reasons. First, there were at least five other witnesses crucial to the determination of the issue (*infra*). Second, the virtue of an evidentiary hearing was the opportunity for cross-examination of Andrew Coats and Jim Laurence. "The power given to a party against whom evidence is offered of cross-examining the witness upon whose authority the evidence depends constitutes a strong test of both the ability and the willingness of the witness to declare the truth. By this means, the opportunity which the witness had of ascertaining the fact to which he testifies, his ability to acquire the requisite knowledge, his powers of memory, his situation with respect to the parties, his motives, are all severally scrutinized and examined." 1 Starkie, *Evidence* 96, 129 (1824). As Dean Wigmore observed, "For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing

by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." 5, Wigmore, *Evidence* (Chadburn Revision), §1367, at p. 32. The oral representations of Petitioner's counsel, Mr. Coats and Mr. Laurence, are utterly worthless in the eyes of the law as a method of determining and resolving conflicting evidence. It is precisely for that reason that courts have not permitted factual disputes on the admissibility of evidence to be resolved by the oral representation of counsel. *United States* v. *Smith,* 495 F.2d 668 (10th Cir. 1974), *United States* v. *Peters,* 625 F.2d 366 (10th Cir. 1980).

Four, there were at least five other witnesses whose testimony would have been crucial at an evidentiary hearing. These witnesses were Larry Joplin, who participated in the plea negotiations, police officers Kenneth R. Smith and Charles Acox, Roy Melton, and Deirdre Dexter. The testimony of Mrs. Dexter was of crucial importance. She would have testified that on February 5, 1978, before the commencement of the Shriver trial, she typed a memorandum to the Shriver file dictated by Shriver's counsel containing a report of his conversation with Laurence and Joplin. That memorandum (dictated and typed before the issue arose in court) established that Joplin and Laurence had told Jones that no reference would be made to the specific $1,500.00 transaction at trial.

Five, the Respondent resisted an evidentiary hearing at trial and at the Motion for New Trial. In the latter proceeding, it did offer affidavits[2] of Joplin, Laurence, Smith and Acox in opposition to a Motion for New Trial based on the failure of the trial court to grant an evidentiary hearing. The apparent willingness of the Respondent's agents to offer every type of statement, except one on a witness stand, under oath, and subject to cross-examination is surely a wonder. The State's affidavits were not even shown or given to Petitioner's counsel prior to the commencement of the hearing for the Motion for New Trial. Subsequently, Petitioner's counsel filed with the trial court

---

[2] The apparent unwillingness of Mr. Coats and his Assistants to take the stand and their sensitivity to the subject of whether they may have violated Mr. Shriver's rights, is nowhere more aptly demonstrated than in supercilious Motion to Censure Petitioner's Counsel and Motion to Strike because he raised the issue in paragraph 19 of Defendant's Motion for New Trial. Mr. Coats alleged that paragraph 19 "contains scurrilous, defamatory and intentionally misleading statements. The making of these statements by counsel for the Defendant (Petitioner) constitutes unprofessional conduct and is wholly unwarranted under the facts and circumstances herein." The court did not sustain either Motion to Strike, filed March 17, 1978. In fairness to Mr. Coats, however, he did inform the court in writing that Petitioner's counsel "should be permitted the opportunity of withdrawing the accusations made therein (paragraph 19 of the Motion for New Trial). Should he fail or refuse to do so, he should receive a public censure and reprimand for this highly improper and unprofessional conduct." Motion to Censure, filed March 17, 1978. This recitation is presented to the Court so that should the Court desire to examine carefully the affidavits submitted as a part of the Appendix to the Brief in Opposition, the Court might be more fully advised of the personal feelings and circumstances that motivated Mr. Coats to make such statements. Obviously, he was not personally indifferent to a successful prosecution of Petitioner. All the more reason to test the statements made by him and his Assistants under oath and subject to cross-examination.

a detailed Response to the affidavits with accompanying exhibits and counter-affidavits, estabishing that the State's affidavits were internally inconsistent, contradictory and, in fact, in some important and crucial respects corroborated the statements contained in Petitioner's offer of proof. For some reason, the Respondent has neglected to call the Court's attention to this portion of the record or to reproduce it in its Appendix. For the Court's convenience, it is included in our Appendix along with a copy of Deirdre Dexter's affidavit and the memorandum to the file dated February 5, 1978, all of which appeared in the record below.

The State's affidavits "is no evidence between strangers" because "there can be no cross-examination." 5 Wigmore, *Evidence* (Chadburn Revision), §1384, p. 85. This rule is well recognized in the Federal Courts. *United States* v. *Dibble,* 429 F.2d 598 (9th Cir. 1970); *London* v. *East Feliciana Parish Police Jury,* 347 F.Supp. 132 (D.C. La. 1972), *reversed* on other grounds 476 F.2d 637. Affidavits cannot serve as proof when factual determinations are required on critical issues raised during a trial. *Locklin* v. *Switzer Brothers, Inc.,* 348 F.2d 244 (9th Cir. 1965), on remand 261 F.Supp. 582; *United States* v. *Certain Land in Borough of Manhattan,* 357 F.Supp. 1382 (D.C. N.Y. 1972).

CONCLUSION

The meeting in the trial judge's chambers was not a substitute for an evidentiary hearing. No testimony was taken under oath, no cross-examination was available, and five of the eight crucial witnesses were not even present. Affidavits subsequently filed by the State, without timely notice to Petitioner, at the hearing on the Motion for New Trial, cannot be used to resolve serious factual disputes concerning the admissibility of evidence. The affidavits, coming as they are from officers of the Respondent most intimately interested in the prosecution of the case, are self-serving. The Respondent's agents should have been required to make such testimony under oath, on a witness stand, and subject to cross-examination.

The Petition for Certiorari should be granted and the cause remanded with instructions to grant the Petitioner an evidentiary hearing at a new trial on his claim that evidence was being introduced against him in violation of the ground rules of plea negotiations.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Phone (405) 233-4321

Counsel of Record for Petitioner

October, 1980

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that true and correct copies (3) of the foregoing Reply Brief of Petitioner were served, by placing same in the United States Mail, postage fully prepaid, to all parties required to be served, to-wit: Jan Eric Cartwright, Attorney General of Oklahoma, 112 State Capitol Building, Oklahoma City, Oklahoma 73105, this _____ day of October, 1980.

Stephen Jones

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. CRF 77-3144
HENRY EARL SHRIVER, Defendant.	)	

Filed in the District Court of Oklahoma County
April 5, 1978

DEFENDANT'S RESPONSE TO MOTION
TO CENSURE AND MOTION TO STRIKE

* * * *

H. *Analysis of Affidavits Supports Our Position.*

Although Mr. Coats states in his affidavit that he was not aware of the $1,500.00 except from Roy Melton, the internal evidence of the affidavit strongly suggests that in fact this is not the case. Consider: (1) Paragraph 3 of Mr. Coats' affidavit admits that he did not learn of the $1,500.00 check until Tuesday, February 7, 1978. Although undoubtedly Mr. Coats and Mr. Melton had had numerous conferences concerning this case, Mr. Coats' own affidavit proves that he had no knowledge of the $1,500.00 from Roy Melton *until after I had discussed the $1,500.00 with Mr. Acox and Mr. Smith on Sunday evening (a fact which they admit) and I had discussed it with Mr. Laurence and Mr. Joplin on Friday, February 3, 1978, (which they deny).* (2) Mr. Coats admits asking Mr. Melton "to tell me of every time he received any money from the Defendant", yet, the only times Mr. Melton mentioned were $1,500.00 from Mr. Shriver in June of 1977, a loan in 1969 and $800.00 cash in February, 1977. The 1969 loan I had brought out at the preliminary hearing, and the $1,500.00 I had already

informed Mr. Acox and Mr. Smith, according to their own admission, and I maintained had informed Joplin and Laurence. The testimony at the trial was that there were numerous transactions between Mr. Melton and Mr. Shriver including another one for which records were available and introduced. Thus, it is something more than a coincidence that although Mr. Coats asked for every transaction, Mr. Melton only told him *of the ones that Mr. Coats or his office were already aware.* (3) Contrary to Mr. Coats' suggestion, Mr. Shriver did not testify at the February trial that the $1,500.00 paid to Mr. Melton was a loan. The transcript of the testimony which Mr. Coats had transcribed shows that Mr. Coats asked Mr. Shriver, "Now, did you loan him some money then later in the year, in '77?" To which Mr. Shriver said, "That's what he testified to yesterday." Then Mr. Coats said, "I'm asking you. Did you *give* him some more money later than *May or June* of that year?" After my objection, Mr. Shriver confirmed that he did, and then Mr. Coats asked what month and Mr. Shriver said, "I believe it was in May or June." Then Mr. Coats asked him, "Did you give him any more money *during the rest of the year?*" to which Shriver said, "No, sir, I didn't give it to him, I loaned it to him." Mr. Coats implies that Shriver testified that the $1,500.00 was a loan. It is clear from the unambiguous testimony that Shriver's statements referred not to the $1,500.00 but, in fact, referred to another loan. Then Coats brings the matter back by referring to Melton's testimony, "that he paid it back." And Mr. Shriver stated, "Mr. Melton has not paid the $1,500.00 back."

Apparently the prosecution didn't understand Mr. Shriver's answers because Mr. Shriver did not testify that the $1,500.00 was a loan. Mr. Shriver would not testify to that because I had advised him that to do such could be perjury, and I had told him to be very careful and measured in his responses.

The fact of the matter is that the District Attorney permitted perjurous testimony to go to the Court because certainly Acox and Smith, (who were then working with the District Attorney on the case) already knew that the $1,500.00 was not in fact a loan. I maintain that Joplin and Laurence also knew it. But even if Coats is correct and Joplin and Laurence didn't know it, certainly Smith and Acox knew it.

(4) Mr. Coats then says, "After the hearing, I conducted an investigation to determine whether there was any truth to his assertion. I determined that no discussion was ever had by Mr. Jones with any of the above listed persons or any other person I could find in regard to a loan transaction between Shriver and Melton in June of 1977." This statement is literally true because I had not had a discussion concerning a loan transaction between Shriver and Melton in June of 1977. The discussions that I had had were with a transaction that was not a loan in any sense of the word.

(5) The Coats' affidavit was obviously prepared in haste and probably not even proofread because it has internal inconsistencies not only which represents a shift from his position in Court both at trial and at the Motion for a New Trial, but also is contrdictory to other affidavits.

I. *The Jim Laurence Affidavit.*

The Laurence affidavit, while self-serving in some respects, clearly discusses the Little Rock transaction, mentions it was by check, and further states that I did not show the check to Laurence. This statement is true because I didn't have the check with me.

Next, Mr. Laurence says that a conference was held in Mr. Coats' office with Roy Melton. Apparently, judging by the Laurence affidavit, he was present at the conference. He states that Mr. Melton indicated that he had borrowed $1,500.00 from Mr. Shriver in May or June of 1977,

and the payment was made by check. Mr. Melton indicated that this loan had been repaid. This is an outright false statement. Roy Melton never paid back any $1,500.00 loan to Earl Shriver in May or June of 1977, because there was no loan made to him and careful questioning of Roy Melton by either Jim Laurence or Andrew Coats would have demonstrated to anyone's satisfaction that there was no loan. Why didn't the State get proof from Mr. Melton that he had paid back this $1,500.00? Mr. Laurence's statement, "Mr. Shriver confirmed in his testimony that he had loaned Mr. Melton $1,500.00 in June of 1977," as we point out is absolutely inaccurate.

J. *The Larry Joplin Affidavit.*

The Larry Joplin affidavit is somewhat more to the point. However, Mr. Joplin is incorrect when he states that I would have to talk to Mr. Laurence about it because Mr. Laurence in conversation was considering Mr. Joplin's advice and it was Mr. Joplin that told me "right, right," that it (the transaction) wouldn't be used.

Mr. Joplin admits that Mr. Laurence said that the matter would not be referred to at trial but claims that this was only the Arkansas matter. What is amazing through all of this is that even though Joplin, Laurence, Acox and Smith had been told by me that Melton had received through Shriver money that might be considered a bribe or a gratuity to influence a tax assessment on behalf of a Little Rock, Arkansas, real estate syndicate, no one thought to ask Roy Melton about this. Here we have a defense attorney coming into the District Attorney's office and admitting that his client has information concerning a gratuity paid to a Deputy County Assessor on behalf of a Little Rock, Arkansas, real estate syndicate, that the client has the proof in the form of a cancelled check and no one asks Roy Melton about this transaction!

K. *Smith Affidavit.*

Kenneth Smith admits that I displayed the check to him at our meeting on February 5, 1978. Mr. Smith is correct that he did not receive any information from me in regard to any loan transaction between Mr. Melton and Mr. Shriver occurring in June of 1977, for the simple reason that I never said that it was a loan transaction.

Smith would then have us believe though that none of the information that he and I discussed for over an hour and a half concerning the investigation into the County Assessor's office, W. P. Bill Atkinson, C. A. Henderson, Jake Logan, Earl Shriver, Don Wilson or Roy Melton, was communicated "to the District Attorney or to any members of his staff."

L. *Acox Affidavit.*

Acox confirms that at the meeting on February 3rd, that the check was not offered for inspection, and this is true because I didn't have the check with me. He, again, confirms that there was a discussion concerning Little Rock, Arkansas, a payment from Shriver to Melton on behalf of Little Rock and that the payment was by check and could be confirmed. The statements contained in paragraph 6 of the Acox affidavit, I have already answered.

Acox, like Smith, denies that he communicated any of the information in that meeting to the District Attorney's office. Yet, Acox or Smith, whichever one I talked with on Monday twice, advised me in the first conversation that they had, in fact, discussed our meeting the night before with the District Attorney. In fact, when the two of them left my hotel room they told me that they had an appointment the next morning at either 8 or 9 a.m. to discuss with Mr. Coats our conversation.

APPENDIX B

MEMO

TO: SHRIVER FILE

FROM: SJ

DATE: FEBRUARY 5, 1978

On Friday February 3, 1978, I met with Jim Laurence, Assistant District Attorney, assisting with the prosecution of this cause. During a portion of the meeting Larry Joplin and Charles Acox were present. I was advised as follows:

1. The arrangement and understanding with Roy Melto is that in return for his testimony the District Attorney's office will agree to stand moot at time of sentencing.

2. I was told by both Laurence and Joplin and Acox that to their knowledge there are not electronic recordings or surveillance of Henry Shriver.

3. In plea bargaining the case, I discussed with them our willingness to enter a plea to two misdemeanors in return for complete and total cooperation, I advised them that Mr. Shriver was innocent of this charge, and that the State's prosecution of him would be prejudiced to good order, in that he knew the manner in which others had secured they were not entitled to and could explain it in the sense that if a person could explain a code, all documents would automatically be decoded. Jim Lawrence asked me who Earl Shriver could give them that to begin with Don Wilson, I also explained that Melton had not been forthcoming. They then asked what specific information Shriver might be willing to give, and I told them that I had something specifically in mind that I could tell them, but I would not tell them unless it was with assurance that it was not to be brought out in trial or referred to in any way, and that no other use would be made of the information. After some exchanging of glances, among them Larry Joplin finally said, "All right, you have our word."

and I said, "you mean your word that it will not be used in trial, won't be referred to in and no other use will be made of it", and he said, "right, right". And Lawrence said it may be something I already know, and I said if that's the case, then if I tell you now you can't use it, is that okay? and he said yes that's okay. I then told them that Roy Melton had received from Earl Shriver as a go-between on several occasions money paid by check and that one occasion was $1500.00 that was paid by a real estate syndicate in Little Rock, Arkansas to influence the lowering in assessment of taxes on property owned by this group in Oklahoma City. At that point, Acox said, Larry we have got to talk about this. I told them that there were more than just the one $1500.00 instance, but that those others were part of the same transaction. They said they understood and would be in touch with me. Before I left I told Acox where I could be reached, and he again told me or said to Larry Joplin, Larry we need to talk about this.

APPENDIX C

County of Garfield)
) S.S.
State of Oklahoma)

AFFIDAVIT

DEIRDRE DEXTER, of lawful age, being duly sworn, states upon her oath as follows:

1. I am employed as a secretary in the office of the Enid lawfirm of Jones and Gungoll.

2. On February 5, 1978, a Sunday, I worked in the office typing numerous documents and papers for Mr. Jones before he left for Oklahoma City that day for the Shriver trial.

3. I have examined what is attached to the Defendant's Response to Motion to Censure and Motion to Strike, a memorandum to the Shriver file dated February 5, 1978. I typed this memorandum myself on February 5, 1978 from a dictating belt from Mr. Jones' office.

4. I remember this particular incident because it was a Sunday, and there was quite a bit of dictation to do.

FURTHER AFFIANT SAITH NOT.

(s) *Deirdre Dexter*
Deirdre Dexter

"Acknowledgment Omitted"

[Appendices B and C here were filed in the District Court of Oklahoma County below on April 5, 1978 as a part of Appendix A.]